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JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

October Term, 1966
No. 483

NEIL REITMAN, *et al.*, and CLARENCE SNYDER,
Petitioners,

vs.

LINCOLN W. MULKEY, *et al.*, and WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,
Respondents.

Brief of the State of California as Amicus Curiae.

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Interest of Amicus.

In 1963, a fair housing bill known as "The Rumford Act" passed the California Legislature by margins of 63-9 in the House and 22-13 in the Senate. It followed two anti-discrimination bills—the Unruh and Hawkins Acts—which were passed in 1959.

The Rumford Act sought a partial end to economic housing decisions based solely on race or religion and afforded a means to the eventual eradication of the product of such housing discrimination—the ghettos of poverty and apathy which so readily spawn crime.[1]

[1] *Jackson v. Pasadena City School District*, 59 Cal. 2d 876 (1963) at 881; 31 Cal. Rptr. 606.

". . . Residential segregation is in itself an evil which tends to frustrate the youth in the area and to cause antisocial attitudes and behavior. Where such segregation exists it is not enough for a school board to refrain from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. . . ."

The Attorney General is "the chief law officer of California."[2] His primary duties are to seek the means by which California's nineteen million residents may live free from crime and unlawful inequities. Toward this end, he can, and does, enforce old laws and encourage the promulgation of new ones. But enforcement and promulgation of individual laws are only effective when people respect and support the general law, and such respect and support is uncontrovertedly weakest in the ghetto. Thus, if we are to minimize crime, we must eliminate the ghetto.[3]

The Rumford Act may well accelerate the ghetto's demise. With the passage of the act, however, a campaign was initiated for its immediate suppression through the device of a constitutional amendment intended not only to nullify the Rumford Act and its predecessors, but also to make the future passage of similar legislation impossible by the state and any of its political subdivisions.

The initiative offered no alternative to the Rumford Act, and destroyed the power of all governmental bodies to legislate against housing discrimination.

The California Supreme Court identified the purpose behind this initiative. Since unconstitutional discrimination now finds sanctuary in our State's Constitution, we are filing this *amicus curiae* brief.

If Article I, Section 26, is upheld; if this Court says that a state court must ignore the unconstitutional reality which spurns seemingly innocuous legislation, then a new avenue of repression will be opened to those in all other states who seek to perpetuate unconstitutional discrimination.

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[2]Cal. Const., Art. V, Section 13.

[3]"A Challenge of Crime in a Free Society" a report by the President's Commission on Law Enforcement and Administration of Justice (United States Government Printing Office, Wash. D.C.) 1967.

ARGUMENT.

I.

The Effect of Article I, Section 26, of the California Constitution Is to Perpetuate Racial Discrimination in Housing in Violation of the Fourteenth Amendment.

Article I, Section 26, of the California Constitution provides:

> ". . . Neither the State nor any subdivision or agency thereof shall deny, limit, or abridge, directly or indirectly, the right of any person who is willing or desires to sell, lease, or rent any part or all of his real property, to decline to sell, lease, or rent such property to such person or persons as he, in his absolute discretion, choses."

This carefully drawn language is as innocuous as the language in Alabama Local Law No. 140, which revised the city boundaries of Tuskegee, Alabama. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). It is as devoid of expressing overt racial purposes as the literacy test in Alabama's Boswell Amendment, *Davis v. Schnell*, 81 F. Supp. 872, aff'd without opinion, 336 U.S. 933 (1949), or the abolition of primaries in *Terry v. Adams*, 345 U.S. 461 (1953).

But like the public enactments struck down or criticized in the above cases, the neutrality of Article I, Section 26, is confined to its surface. The California Supreme Court found that behind its bland language lies the same purpose which rendered these earlier pronouncements suspect or unconstitutional: the perpetuation of racial and ethnic discrimination in violation of the Fourteenth Amendment.

Petitioners now insist the decision to sponsor Proposition 14 was born of reasons not confined to race and ethnic groups.

> "The measure establishes non-regulation by the State over conduct in the rental or sale of residential property by its owners not only when based on racial or religious discrimination but when done for any reason or for no reason at all. Thus, the Section forbids governmental restrictions upon the privilege of residential property owners to choose buyers or tenants based upon sex, age, size of family, existence of children, possession of pets, appearance, or whatever. . . ." (Br. for Petners, pp. 17-18.)

The campaign for Proposition 14's passage was not consistent with this disclaimer.

The purpose was so clear to the majority of the California Supreme Court that they dismissed any allegations to the contrary in two sentences:

> "Proposition 14 was enacted against the foregoing historical background [of housing legislation] with the clear intent to overturn state laws that bear on the right of private sellers and lessors to discriminate, to forestall future state action that might circumscribe this right. In short, Proposition 14 generally nullifies both the Rumford and Unruh Acts as they apply to the housing market." *Mulkey v. Reitman*, 64 Cal. 2d 529, 534-35 (1966); 50 Cal. Rptr. 881.

The Justices of the California Supreme Court lived through the heated campaign over Proposition 14, and recognized the reality which lay behind the proposition's

language. This reality was also apparent from the official arguments on Proposition 14 submitted to the voters, which petitioners attach in the appendix to their brief. (Appen. pp. 3-4.) After stating that:

> "Your 'Yes' vote on this constitutional amendment will guarantee the right of all home and apartment owners to choose buyers and renters of their property as they wish without interference by state or local government,"

the proponents immediately launched an attack upon the Rumford Act:

> "Most owners lost this right through the Rumford Act in 1963. It says they may not refuse to sell or rent their property to anyone for reasons of race, color, religion, national origin or ancestry."

Their conclusion is of particular import:

> "Opponents of this amendment show a complete lack of confidence in the fairness of Californians in dealing with members of minority groups. They believe, therefore, the people must not be allowed to make their own decisions.
>
> "Your 'Yes' vote will end such interference. It will be a vote for freedom."

The argument concentrates on the Rumford Act and the need to prevent similar legislation. It also makes specific reference to minority groups, although none of these subjects appear in the body of the initiative or its official legislative analysis.[4]

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[4]See XLIV California Real Estate Magazine No. 11, Sept. 1964.

The only "right" taken away by the Rumford Act was the "right" to discriminate on the basis of race, color, religion, national origin and ancestry.[5] The Rumford Act was referred to as the Rumford *Forced* Housing Act. The proponents did not seek a simple repeal of the Rumford Act. Nor did they merely seek to abolish existing fair-housing enactments. They sought further and most importantly to preclude any future considerations of this issue by the duly elected representatives of the State, county and city governments.

These purposes are not apparent from a simple perusal of the language used in the initiative. However, this court has had no difficulty in discerning the true objectives of sophisticated legislation. *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the mode was a sophisticated revision of the city boundaries of Tuskegee, Alabama. On its face, Alabama's Local Law 140 displayed no discriminatory purpose. But the petitioners averred that the newly created boundaries would eliminate all but a few of the city's Negro voters, while retaining all its white voters. This Court held that,

> "if these allegations remained uncontradicted or unqualified, the conclusion would be irresistible, . . . that the legislation is solely concerned with segregating white and colored voters by forcing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." *Id.* at 341.

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[5]Art. I, § 1, Cal. Const.

In *Davis v. Schnell*, 81 F. Supp. 872, aff'd without opinion, 336 U.S. 933 (1949), the means was a literacy test adopted as the "Boswell Amendment" by the people of Alabama. Again, the words revealed no discriminatory purpose. But, the district court noted:

> ". . . while it is true that there is no mention of race or color in the Boswell Amemdnent, this does not save it [since] . . . it clearly appears that amendment was intended to be and is being used for the purpose of discrimination against applicants for the franchise on the basis of race or color." *Id.* at 880.

In *Anderson v. Martin*, 375 U.S. 399 (1964) this court in reviewing a statute which provided for the race of all candidates for public office be placed on the ballot declared that:

> "[In] the abstract, Louisiana imposes no restriction upon anyone's candidacy nor upon an elector's choice in the casting of his ballot. But by placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which a racial prejudice may be so aroused as to operate against one group because of race . . ." *Id.* at 402, 403.

This case presents an analogous situation. The enactment purported to be a lawful exercise of legislative power, and was not discriminatory on its face; but in reality it is a state supported vehicle for the exercise of private discrimination.

Petitioners question the California Supreme Court's finding of the discriminatory purpose of Article I, Sec-

tion 26, and ask this Court to overrule that finding. The long history of California has been replete with examples of discrimination in housing; many of the neighborhoods of its largest cities have become non-white by custom and legal sanction.[6]

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[6]In Los Angeles County in 1960, 334,916 Negroes out of a total Negro population of 461,546, lived within the central district of the City of Los Angeles. Another 36,291 Negroes lived in a highly segregated unincorporated area contiguous to the City's central district. About 62,720 Negroes lived in 67 other incorporated cities within the county but of that number 59,022 Negroes lived in segregated areas of Long Beach, Pasadena, Compton, Santa Monica, and Monrovia. The remaining 3,718 Negoes lived in 62 cities within the county having a combined population of 1,829,907. (Report of the Los Angeles Human Relations Commission, March 1963.)

In 1965, the McCone Commission Report found that 88.6% or 575,900 of the countys' 650,000 Negroes lived within the 46 square mile curfew area of the Watts Riots. The total area of Los Angeles County is 452 square miles (p. 75 [1966]). *"Violence in the City—An End or a Beginning"* Report of California's Governor's Commission on the Los Angeles Riots, December 1965; see *Social Profiles: Los Angeles County*, by Ed Freudenberg and Lloyd Street (Los Angeles Welfare Planning Council Report No. 21, 1965) pp-scd-sc 15; *Background for Planning* by Marchia Meeker with Joan Harris (Los Angeles Welfare Planning Council Report No. 17, 1964), pp. 54-62 and Tables VII, VIII, IX, X and XI.

In San Francisco, while the total population has shown a slight decrease from 740,300 in 1960 to 740,200 in 1965, the non-white population has increased from 18.4% in 1960 to 22.8% in 1965. And 21.1% of the Negro population lives in three census tracts where the percentage of Negroes approaches 70%. (Fair Employment Practice Commission of California Memo. No. 33, 1966.)

In Oakland, California, 77% of the Negroes living within that community live in four target areas of the Anti-poverty Program that have a high concentration of housing, health and job problems.

During the period from 1960 to 1965, Alameda County, where the City of Oakland is located, had a population increase of 148,000 people and 115,000 of that number were located in the white suburbs in the southern part of the county. Oakland's population remained constant: 381,350 in 1960, 386,186 in 1965. However, 30,000 whites have moved out of the city and were replaced by 30,000 Negroes. The percentage of Negroes liv-

In their brief, petitioners emphasize that this is a suit between individuals, who are merely exercising their constitutional right to discriminate. Any theoretical argument that the petitioners possess such a right was removed by the passage of the Rumford and Unruh Acts. If petitioners possess such a right to discriminate on the basis of race or religion, it arises *only* because of Article I, Section 26. Clearly, the State is substantially involved in the present acts of discrimination, because without Article I, Section 26, petitioners would possess no right to discriminate on the basis of race or religion.

Article I, Section 26 does more than make the State neutral in matters of discrimination in housing. It purports to give legality to every act of racial discrimination committed by a property owner in the sale or rental of real property.

Far from acting as "neutral" in this instance, the State is actually declaring that henceforth no fair-housing acts can be passed by the state Legislature or any cities, counties, or political subdivisions. This constitutional barrier to such legislation or enactment of ordinances by local entities in the fair-housing field constitutes an affirmative stand by the state electorate against fair-housing enactments contrary to the Fourteenth Amendment of the United States Constitution.

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ing in Alameda County is 14% while the percentage in Oakland is 30% and in Berkeley 20.6%. In the southern part of the county the percentage of Negroes is only 0.1%. (Report of Fair Employment Practice Division, Memo. No. 33, 1966.)

Finally, in San Diego County 82% of the Negroes residing there live in 10 of the 123 census tracts, while 84 tracts have fewer than nine Negroes and 32 tracts have no Negroes. (Governor's Advisory Committee on Housing Problems, Report on Housing in California, 38, 1963.)

If the measure had merely repealed the Unruh and Rumford Acts, the state Legislature and other political subdivisions of the state would have been free to enact or refuse to enact such legislation. Then a state of neutrality would have existed. However, this enactment not only cancels the effectiveness of the existing state legislation but also precludes cities, counties and other political sub-divisions which have legislative power within their own jurisdictional boundaries[7] from passing fair-housing legislation even though such localities might desire to legislate to meet local problems. Article I, Section 26, "stagnates" or "freezes" their power to enact fair-housing ordinances.

II.

The Enactment of Section 26 Was Itself Prohibited State Action in Violation of the Fourteenth Amendment Because It Was an Abdication of a Traditional Governmental Function for a Racially Discriminatory Purpose.

The California Supreme Court determined that the State was significantly involved in, and responsible for, the acts of racial discrimination in this case. Amicus curiae further submits that the enactment of section 26

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[7]Article XI, Section 11, of the California Constitution reads as follows:

"Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

In 40 Ops. Cal. Att'y. Gen. 114 (September 1962) prior to the enactment of the Rumford Fair-Housing Act, it was concluded that as of that date the State of California had not preempted the field with respect to discrimination in housing and, thus, local entities could enact fair-housing ordinances. Thus, a mere repeal of the Rumford Act would have created the situation where local entities could have enacted fair-housing ordinances.

was itself prohibited state action in violation of the Fourteenth Amendment because it was an abdication of a traditional governmental function for an impermissible purpose.

The electorate's enactment of a state constitutional amendment is "state action" in its most fundamental form; the product of such enactment is subject to the limitations imposed by the Constitution of the United States, *Lucas v. Forty-fourth General Assembly*, 377 U.S. 715, 736-737 (1964).

The ability to determine whether to legislate in a given area is undeniably a fundamental governmental function. By virtue of the enactment of Article I, Section 26, all levels of California government were forced to abdicate this basic function for the purpose of permitting private racial and religious discrimination in the transfer of real property. Minority groups are therefore precluded from presenting their grievances about, and seeking redress for, such racial or religious discrimination to the governmental bodies of the State of California. This denial of access to the Legislature violated the Fourteenth Amendment.

Furthermore, the disability superimposed by section 26 was limited to one aspect of property rights, the right to sell, lease, or rent real property. It was enacted at the expense of an equally important aspect of property rights, the right to acquire and possess real property.[8]

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[8]*Cf. Barbier v. Connolly*, 113 U.S. 27, 32 (1885); *Shelley v. Kraemer*, 334 U.S. 1 (1948); Article I, Section 1, California Constitution which reads as follows:

> "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defendang life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

Section 26 constituted a grant of virtual immunity to persons who would vent racial and religious discrimination against those seeking to exercise their right to acquire property on an equal basis in an open market. As this Court noted in *Truax v. Corrigan,* 257 U.S. 312, 333 (1921):

> "Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal right or a property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted to work against, a larger class."

This Court is familiar with previous attempts by states to effectuate private racial discrimination while purportedly becoming neutral in an area of traditional governmental concern. The series of cases culminating with *Terry v. Adams,* 345 U.S. 461 (1953)[9] involved an increasingly sophisticated pattern of disenfranchising Negro voters in Texas. The court ultimately found that the racial discrimination in the selection of primary candidates by the Jaybird Association, a voluntary political club uncontrolled by state statute, was violative of the Fifteenth Amendment because it was the basic step in accomplishing exactly what the Fifteenth Amendment sought to prevent. *Terry v. Adams, supra,* at 469-470. The court noted that racial discrimination in county-operated primaries would be unconstitutional and viewed the state's withdrawal from that part of the electoral process as

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[9] *Nixon v. Herndon,* 273 U.S. 536 (1927); *Nixon v. Condon,* 286 U.S. 73 (1932); *Smith v. Allwright,* 321 U.S. 649 (1944).

". . . circumvention, to permit within its borders the use of . . . [a] device that produces an equivalent of the prohibited election." *Id.* at 469.

Similarly, in *Rice v. Elmore,* 165 F. 2d 387 (4th Cir.), *cert. den.* 333 U.S. 875 (1947) and *Baskin v. Brown,* 174 F. 2d 391 (4th Cir. 1949), approved in *Terry v. Adams, supra,* the Fourth Circuit found that South Carolina's abandonment of its traditional role in the primary election for the purpose of permitting racial discrimination by private political clubs was an administration of the state's election laws:

"[i]n such way as to result in persons being denied any real voice in government because of race and color, [and] it is idle to say that the power of the state is not being used in violation of the Constitution." *Rice v. Elmore, supra,* at 391.

When South Carolina further sought to avoid the burden of complying with the equal protection guarantee of the Constitution by shifting even greater control of the primary election to private political clubs, the court again invalidated the scheme, stating:

"The devices adopted showed plainly the unconstitutional purpose for which they were designed; but, even if they had appeared to be innocent, they should be enjoined if their purpose or effect is to discriminate against voters on account of race." *Baskin v. Brown, supra,* at 393.

Manipulations by states to effectuate racial discrimination are not limited to elections. In *Griffin v. School Board,* 377 U.S. 218 (1964), Prince Edward County, Virginia, sought to avoid the result of this Court's holding in *Brown v. Board of Education,* 347

U.S. 473 (1954), by abandoning its traditional role in the educational process. This court, however, readily recognized the purpose for which the county had closed its public schools and found such action violative of the Equal Protection Clause:

> ". . . But the record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional" *id.* at 231.

Minority groups have no less right to the equal protection of state laws regulating the legislative processes than to those regulating voting or education. Housing discrimination infinitely complicates the school segregation problem which this Court has been trying to solve for over a decade. In addition to causing the victims to live in crowded, expensive, unhealthy, and unsafe conditions, racial discrimination in housing, inflicts a "continuing subjection to public indignity and humiliation" magnified by significant state participation and involvement in the activities of the discriminator.[10]

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[10] "[H]ousing segregation remains as the most serious and least soluble aspect of the race problem, at least in the Northern States.' 'Myrdal, *An American Dilemma* XL-XLI (McGraw-Hill, Paperback ed. 1964).

"Fourteenth Amendment Aspects of Racial Discrimination in 'Private Housing,'" 52 Calif. L. Rev. 1, 28-30 (1964). We are dealing neither with a luxury nor a frill but "a basic aspect of a decent life." *Ibid.*

This Court should not hesitate to strike at the heart of the evil embodied in Article I, Section 26: the total disabling of California government from carrying on their legislative functions for the purpose of effectuating racial discrimination. The determination that the enactment of section 26 denied the equal protection of the laws to those groups who have been subjected to racial or religious discrimination, does not constitute a mandate that a state must take affirmative steps to eliminate such discrimination; rather, it is a recognition that the governmental units vested with the power and duty to legislate must remain free to determine whether it is in the public interest to act or to refrain from acting in this particular area.

The language of Circuit Judge Parker in *Rice v. Elmore, supra,* at p. 392, is apropos to the present case:

> "The Fourteenth and Fifteenth Amendments were written into the Constitution to insure to the Negro, who had recently been liberated from slavery, the equal protection of the laws and the right to full participation in the process of government. These amendments have had the effect of creating a federal basis of citizenship and of protecting the rights of individuals and minorities from many abuses of governmental power which were not contemplated at the time. Their primary purpose must not be lost sight of, however; and no election machinery can be upheld if its purpose or effect is to deny to the Negro,

on account of his race or color, any effective voice in the government of his country or the state or community wherein he lives."

Section 26 would have effectively accomplished the purposes for which it was enacted: to preclude those persons racially discriminated against in transfer of property from presenting their grievances to the Legislature; to insure that private discrimination would prevail, and to maintain the strict pattern of segregation of the communities in California. Its enactment was an affront to the dignity of the constitutional standards of the Fourteenth Amendment.

Conclusion.

The California Supreme Court was correct in its resolution of this issue and its decision should be affirmed.

Respectfully submitted,

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